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April 28, 2017

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**THIS IS AN URGENT LEGAL MATTER REQUIRING YOUR  
IMMEDIATE ATTENTION**

*Via Certified Mail, Return Receipt Requested:*

Mr. Brad Duff  
General Manager, Big Island Dairy  
Mr. Riley Smith  
Co-owner & Dairy Manager, Big Island Dairy  
39-3308 Hawaii Belt Road  
Hilo, HI 96720

Mr. Steven Whitesides  
Manager, Big Island Dairy LLC  
P.O. Box 55  
Ookala, HI 96774

Mr. Derek Whitesides  
Mr. Steven Whitesides  
Managers, Big Island Dairy LLC  
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Rupert, ID 83350

Mr. Glen T. Hale  
Registered Agent, Big Island Dairy LLC  
2970 Kele St., Ste. 210  
Lihue, HI 96766

*Other recipients identified on last page*

**NOTICE OF INTENT TO SUE PURSUANT TO THE FEDERAL WATER POLLUTION  
CONTROL ACT, 33 U.S.C. § 1365(a)(1)**

Dear Sirs:

Pursuant to the citizen suit provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(1) (hereinafter referred to as the "Clean Water Act" or "CWA"), Kupale Ookala, a Hawaii not-for-profit corporation, and Center for Food Safety, a Washington, D.C.

not-for-profit corporation (hereinafter, "Notifiers"), hereby notify you that on or after the 60<sup>th</sup> day from the date of this notice, Notifiers intend to initiate a citizen suit in Hawaii Federal District Court against Big Island Dairy, LLC, the owner of Big Island Dairy, located at 39-3308 Hawaii Belt Road (hereinafter referred to as "Big Island Dairy"). The lawsuit will allege that Big Island Dairy has violated and remains in violation of the Clean Water Act and applicable state water pollution control laws by discharging animal wastes, solid manure, liquid manure, fuel, and chemical pollutants to waters of the United States without coverage under a valid National Pollutant Discharge Elimination System ("NPDES") permit, and by failing to comply with the terms of its NPDES permit authorizing discharges of stormwater associated with construction activities. The animal waste contains bacteria and other pathogens harmful to human health and the environment.

## LEGAL FRAMEWORK

The Clean Water Act is the cornerstone of surface water quality protection in the United States. Sections 301 and 402 of the CWA establish the basic requirement that the discharge of pollutants into surface waters requires a permit before any such discharge is allowed. Section 301 of the CWA provides that "except as in compliance with...section...1342...of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).<sup>1</sup> Section 402 of the CWA establishes the National Pollutant Discharge Elimination System (NPDES) Program, which controls water pollution by regulating point sources. Concentrated animal feeding operations, or CAFOs, are point sources under the Clean Water Act. 33 U.S.C. § 1362(14). As such, a CAFO is prohibited from discharging pollutants into waters of the United States under normal operating conditions and may only discharge in the event of a 25-year, 24-hour storm event if that CAFO has coverage under and complies with a general or individual NPDES permit. 33 U.S.C. § 1311(a). Big Island Dairy qualifies as a "Large CAFO," because that it has 700 or more mature dairy cows. 40 C.F.R. § 122.23(b)(4).

Further, section 402 requires permits for any stormwater discharge where "the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E). "Storm water" means storm water runoff, snow melt runoff, and surface runoff and drainage. 40 C.F.R. § 122.26(b)(13).

EPA has delegated the administration of the NPDES permit program in Hawaii to the Hawaii Department of Health ("HDOH"). The Clean Water Branch of the Department of Health, specifically, administers the NPDES permit program by issuing individual permits and approving coverage under general permits. Hawaii does not have a "general" CAFO NPDES permit; accordingly, discharges from any CAFO in Hawaii should be covered under an individual NPDES permit. Additionally, HDOH requires that persons engaged in "construction activities, including, but not limited to, clearing, grading, excavation, and construction support

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<sup>1</sup> Similar language is reflected in Hawaii Revised Statutes § 342D-50(a), which provides: "No person...shall discharge any water pollutant into state waters, or allow any water pollutant to enter state waters except in compliance with this chapter, rules adopted pursuant to this chapter, or a permit or variance issued by the director."



activities that result in the disturbance of one acre or more of total land area” obtain coverage under the general NPDES permit for their construction-related stormwater discharges. Hawaii Administrative Rules (“HAR”), Chapter 11-55, Appendix C, Section 1.1 (NPDES General Permit Authorizing Discharges of Storm Water Associated with Construction Activity, effective 12/6/2013). Alternatively, HDOH may require any applicant to apply for an individual permit. HAR, Chapter 11-55, Appendix C, Section 2.3.

Once regulated by a NPDES permit, permittees must comply with all terms and conditions of that permit. Permittees who violate the terms of any applicable permit are subject to citizen enforcement actions, and citizens may bring suit against a party discharging pollutants into waters of the United States without a permit. *See, e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001). The Clean Water Act authorizes citizens to file suit against any person alleged to be in violation of an effluent standard or limitation. 33 U.S.C. § 1365(a)(1). An “effluent standard or limitation” includes a “permit or condition thereof issued under section 1342.” 33 U.S.C. § 1365(f)(6).

According to publicly-available records, Big Island Dairy lacks coverage under a general or individual CAFO permit. Public records also indicate that Big Island Dairy has obtained an individual permit for construction-related stormwater discharges under HAR Ch. 11-55, Permit No. HI S000224, effective March 21, 2013 (hereinafter “Stormwater Construction Permit”).

### **VIOLATIONS OF THE CLEAN WATER ACT**

Notifiers intend to initiate a citizen suit on or after the 60th day from the date of this letter against Big Island Dairy for failing to comply with the Clean Water Act. Specifically, the lawsuit will allege that Big Island Dairy has discharged and continues to discharge animal wastes, liquid and solid manure, fuel, and chemical pollutants, along with related pollutants, from a point source into waters of the United States, including ditches and drainage canals, gulches, streams, and coastal waters of the Pacific Ocean. Big Island Dairy has no NPDES permit authorizing these discharges. The pollutants that have been, are being, and will continue to be discharged include facility wastewater, process water, washwater, liquid and solid animal wastes, debris, sediment, chemicals, and deceased cows or parts thereof. Animal waste contains, among other pathogens and pollutants, fecal coliform and E. coli bacteria, nitrogen, phosphorus, and suspended solids. The lawsuit will also allege that Big Island Dairy has violated and remains in violation of numerous provisions of its Stormwater Construction Permit.

#### **Unpermitted Discharges**

Big Island Dairy’s improper manure management and storage practices are causing unpermitted discharges of liquid and solid animal waste. Upon information and belief, Big Island Dairy sprays liquid manure on its crop fields during high wind days or immediately preceding or during a precipitation event. Applications are also made in quantities that exceed any notion of an “agronomic rate.” Additionally, Big Island Dairy’s upper and lower manure storage lagoons are located in close proximity to Kaohaoha Gulch. Big Island Dairy’s lower lagoon includes an overflow spillway and conveyance channel into Kaohaoha Gulch, and typically has minimal available freeboard. The spillway and conveyance have been deeply

channelized over the years, evidence that discharges of animal wastes from the lagoon to the Kaohaoaha Gulch occur frequently. Big Island Dairy stores composted manure solids on an uncovered, concrete-padded loading area in close proximity to Alaialoa Gulch, and deposits deceased cows directly into an open pit in an existing gulch on its property. Pollutants from the dairy operations that flow through this gulch enter the lower lagoon, which, in turn, overflows into an adjacent spillway and discharges into Kaohaoaha Gulch.

Other operational practices at Big Island Dairy are also a problem. Big Island Dairy does not safely store its caustic detergent and acidic clean-in-place chemicals; HDOH staff have observed multiple 55-gallon drums of caustic detergent and acid stored together on pallets, outdoors, and without any secondary containment. Big Island Dairy also has at least four above-ground gasoline and diesel fuel storage tanks on its property, at least one of which experienced an approximately 100-gallon diesel leak in 2015 (documented by HDOH).

Discharges of liquid and solid animal waste, wastewater, process water, washwater, debris, sediment, deceased cows or parts thereof, fuel, and chemicals resulting from Big Island Dairy's improper manure application and storage practices, and improper operational practices, as described above, have occurred and continue to occur regularly, on approximately a weekly basis, from at least April 28, 2012 to present, into one or more of Alaialoa Gulch, Kaohaoaha Gulch, and Kaula Gulch, which are classified as Class 2 inland state waters that flow into the Pacific Ocean.

In addition to the recurring discharges described above, upon information and belief, unpermitted discharges resulting from the improper manure management and storage practices described above have occurred on at least the following specific dates:

- 6/30/14: animal waste discharge into Alaialoa Gulch, as documented by HDOH
- 7/1/14: animal waste discharge into Alaialoa Gulch, as documented by HDOH
- 7/2/14: animal waste discharge into Alaialoa Gulch, as documented by HDOH
- 9/24/16: animal waste discharge into Kaohaoaha Gulch
- 3/5/17: animal waste discharge into Alaialoa Gulch
- 3/10/17: animal waste discharge into Alaialoa Gulch
- 3/14/17: animal waste discharge into Alaialoa Gulch
- 3/19/17: animal waste discharge into Kaohaoaha Gulch
- 4/2/17: animal waste discharge into Alaialoa Gulch
- 4/17/17: animal waste discharge into Alaialoa Gulch

#### Violations of Stormwater Construction Permit

Upon information and belief, Big Island Dairy has violated and remains in violation of numerous provisions of its Stormwater Construction Permit, including, but not limited to:

- Section A.1: "The Permittee shall [c]omply with all materials submitted in and with the application, dated January 3, 2013, and additional information, dated January 17, 2013." These materials include a description of the scope of construction at the site, which includes "two freestalls, a lagoon, digester and bedding master structures and a



parlor.” See Section 1.7 of “Site-Specific Construction Best Management Practice Plan,” dated 1/3/13, revised 1/16/13. Upon information and belief, a milk processing facility is currently being constructed at the site, in violation of Big Island Dairy’s Stormwater Construction Permit.

- Section A.5: “The Permittee shall [n]ot cause or contribute to a violation of the basic water quality criteria as specified in HAR, Chapter 11-54, Section 11-54-4.” Recent photographs, videos, personal observations, and test results indicate that Big Island Dairy’s receiving waters are not meeting basic water quality criteria; specifically, tests have shown elevated turbidity, and photographs and videos depict very brown, turbid water. HAR, Chapter 11-54, Section 11-54-4(a)(3). Test results also show very high levels of E.coli and enterococcus, which may be “toxic to human, animal, plant, or aquatic life[,]” in violation of Big Island Dairy’s Stormwater Construction Permit. HAR, Chapter 11-54, Section 11-54-4(a)(4).
- Sections A.6 and A.7: “The Permittee shall [i]nspect, at a minimum of once per week, the receiving state waters...to detect violations of and conditions which may cause or contribute to a violation of the basic water quality criteria as specified in HAR, Chapter 11-54, Section 11-54-4[,]” and “The Permittee shall [i]mmediately stop, reduce, or modify construction, or implement new or revised BMPs as needed to stop or prevent a violation of basic water quality criteria as specified in HAR, Chapter 11-54, Section 11-54-4.” Upon information and belief, Big Island Dairy is not conducting weekly inspections nor is it taking immediate steps to correct violations of basic water quality criteria, in violation of its Stormwater Construction Permit.
- Section B.2: “The Permittee shall [e]nsure that any comingled storm water that contacts pollution sources/contaminated soil is prevented from discharging to State waters.” Upon information and belief, Big Island Dairy is not preventing storm water that contacts pollution sources on Big Island Dairy’s site from discharging to State waters, in violation of its Stormwater Construction Permit.
- Section B.6: “The Permittee shall [i]mmediately notify the Director of all incidences of noncompliance and identify the pollutant(s) source(s) and the proposed and implemented control or mitigative measures as required in Section 16 of the “Standard NPDES Permit Conditions.” Upon information and belief, Big Island Dairy has not notified HDOH of its noncompliance with any sections of its Stormwater Construction Permit, including the sections identified herein, in violation of its Stormwater Construction Permit.
- Section B.8: “The Permittee shall [submit] [a]ll reports, notifications, and updates to information on file...through the CWB Compliance Submittal Form for Individual NPDES Permits and Notice of General Permit Coverages (NGPCs).” The HDOH permit file associated with Permit No. HI S000224 contains no records of inspection or monitoring reports or updates to any permit information. Upon information and belief, Big Island Dairy has not submitted the required reports, notification, or updates, in violation of its Stormwater Construction Permit.

- Section C. Section C describes Best Management Practices (“BMPs”), construction management techniques, vegetation controls, and structural controls. Upon information and belief, Big Island Dairy has violated numerous provisions of Section C, including: failing to prevent loose particles, sand, soil, silt, and other construction debris from being washed away by storm water to drainage systems and State waters, discharging water used for dust control and irrigation to State waters, failing to implement appropriate BMPs for unprotected stockpiled material, failing to assure that the implemented BMPs are effective and that discharge effluent is in compliance with basic State water quality standards, failing to properly construct and maintain erosion and sediment control measures throughout the construction period, failing to regularly inspect and repair control measures and keep records of the same, failing to maintain records of the duration and volume of storm water discharges, failing to divert storm water flowing toward the construction area, and failing to ensure that discharges do not cause or contribute to a violation of basic water quality criteria as specified in HAR, Chapter 11-54, Section 11-54-4.

Additionally, Big Island Dairy must adhere to the “Standard NPDES Permit Conditions” available on the HDOH website at <http://health.hawaii.gov/cwb/files/2013/05/stdcond15.pdf> (version 15; *conditions formerly available at* <http://www.hawaii.gov/health/environmental/water/cleanwater/index.html>, identified in Big Island Dairy’s Stormwater Construction Permit as version 14). Upon information and belief, Big Island Dairy has violated and continues to violate multiple sections of the Standard NPDES Permit Conditions, including Section 1.a (narrative basic water quality criteria), Section 6 (duty to comply), Section 8 (duty to mitigate), Section 9 (proper operation and maintenance), Section 14 (monitoring and records), and Section 16 (reporting requirements). As described above, Big Island Dairy is causing or contributing to violations of basic water quality criteria, is out of compliance with multiple provisions of its Stormwater Construction Permit, has failed to take all reasonable steps to minimize or prevent discharges, has failed to properly operate and maintain facilities and systems of treatment or control used to achieve compliance with its Stormwater Construction Permit, has failed to properly inspect and monitor water quality when necessary, and has failed to submit such reports to HDOH. Additionally, Big Island Dairy is engaged in construction activities that exceed the scope of its permitted construction.

### CIVIL PENALTIES

Notifiers will allege in the lawsuit that each of the separate failures identified above constitutes a discrete violation of the Clean Water Act, subjecting Big Island Dairy to a daily penalty of up to \$51,570 per day, per violation.

In addition to civil penalties, Notifiers will seek an order requiring Big Island Dairy to abate all discharges and to obtain and come into full compliance with an individual NPDES CAFO Permit and with the terms of its Stormwater Construction Permit. Furthermore, Notifiers will seek an order from the Court requiring Big Island Dairy to pay Notifiers’ attorneys’ fees and costs, which include expert witness fees and costs.



## PARTIES GIVING NOTICE

The names, addresses, and phone numbers of the parties giving this Notice of Intent to Sue are:

Kupale Ookala  
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Ookala, HI 96774  
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Center for Food Safety  
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The names, addresses, and phone numbers of counsel for the parties giving this Notice of Intent to Sue are:

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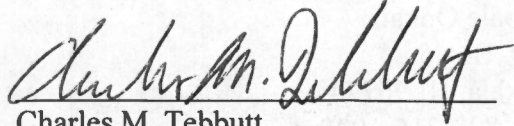
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## CONCLUSION

We will be available to discuss effective remedies and actions that will assure Big Island Dairy's future compliance with the Clean Water Act, and all other applicable state and federal environmental laws. If you wish to avail yourself to this opportunity and avoid the need for

adversarial litigation, or if you have any questions regarding this letter, please contact the undersigned. If you are or will be represented by an attorney, please have that attorney contact the undersigned instead.

Sincerely,



Charles M. Tebbutt  
Sarah A. Matsumoto  
Daniel C. Snyder  
Law Offices of Charles M. Tebbutt, P.C.

*cc Via Certified Mail, Return Receipt Requested, to the following:*

Scott Pruitt, Administrator  
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Alexis Strauss, Acting Administrator  
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